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In re PATENT APPLICATION of:
MARIA PALASIS
Application No. 09/760,807
Filed: January 17, 2001
For: Attorney Docket No. 120113/58101

DECISION ON PETITION

This is a decision on the petition filed on August 31, 2004 by which Petitioner requests reconsideration and withdrawal of the election of species requirement rendered February 24, 2004 and made final in the Office action dated June 15, 2004, and that withdrawn claims 4, 6, 7, 11, 13, 15, 17-19, 22 and 25-27 be reinstated and continued to be examined on the merits. The petition is considered pursuant to 37 CFR 1.144 and 37 CFR 1.181, and no fee is required.

The petition is granted.

A review of the record shows that an election of species requirement was made on February 24, 2004 subsequent to four examinations of claims to all species disclosed in this application.

This application was originally filed with 25 claims drawn to the various species. During the course of the prosecution of this application, claims 5, 16 and 24 have been cancelled and new claims 26 and 27 were added. The subject matter of claims 26 is commensurate with the subject matter of amended claim 13 presented in the petitioner's amendment dated May 16, 2002. The subject matter of claim 27 is commensurate with the subject matter of amended claim 1 presented in petitioner's amendment dated February 28, 2003.

As per MPEP 802.02 in order to require petitioner to elect a single species for examination, two criteria must be satisfied:

1. that each species must be distinct as claimed, and
2. that there would be a serious burden on the examiner if the requirement was not made.

Aside from the fact that neither criteria above has been shown by the examiner, the undersigned concurs with petitioner that, in this case, restriction of the claims can not be proper because the subject matter of each of the pending claims has already been searched. The examiner's willingness to examine the subject matter of all the pending claims (in this case, four different times) is a representation by the Patent Office that all pertinent areas have been searched and, in so doing, indicates that the Examiner did not believe that the examination of all the respective inventions imposed a burden as required for insisting upon restriction as per the guidelines in the MPEP, section 808.02.

For the reasons outlined above, the election of species requirement promulgated and construed as being made final is not in accordance with proper Office procedure. Accordingly, the Office action dated February 24, 2004 is hereby vacated.

As a further procedural note, as this petition grants Petitioner relief from the election of species requirement, the previously withdrawn claims will be reinstated and all amendments thereto are deemed responsive to which a new Office action will be rendered. The application is being forwarded to the Supervisory Patent Examiner of Art Unit 3763 who will have the examiner promulgate an action on the merits of the presently pending claims not inconsistent with this decision.

PETITION GRANTED.



Frederick Schmidt, Director
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